INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	3
Statement	5
The question is substantial	13
Appendix "A"—The opinion, dated April 27, 1951, of Justice Robert H. Davidson, Associate Justice of the Superior Court of New Jersey	16
Appendix "B"—The opinion, dated June 26, 1952, of the Supreme Court of New Jersey	24

Table of Cases Cited

Adler v. *Board of Education*, 342 U.S. 485	2
Ayer v. *Commissioners*, 242 Mass. 30	14
Brougher v. *Board of Public Works*, 107 Cal. App. 15	14
Bryant v. *Zimmerman*, 278 U.S. 63	8
Copperweld Steel Co. v. *Industrial Commission of Ohio*, 324 U.S. 780	8
Euclid v. *Ambler Realty*, 272 U.S. 365	14
Independent Warehouse, Inc. v. *Scheele*, 331 U.S. 70	2
Jamison v. *Texas*, 318 U.S. 413	2
King Manufacturing Co. v. *City of Augusta*, 277 U.S. 100	2
Kunz v. *New York*, 340 U.S. 290	2
Lincoln Trust Co. v. *Williams Building Corporation*, 229 N.Y. 313	14
Lionshead Lake, Inc., etc. v. *Township of Wayne, etc.*, 13 N.J. Super. 490, 89 A. 2d 693	1, 2
Main Street Corp. v. *Brockton*, 323 Mass. 646	14
Senesky v. *Lawler*, 307 Mich. 728	14
Welch v. *Swasey*, 214 U.S. 91	14
Wulfsohn v. *Burden*, 241 N. Y. 288	14

Statutes and Other Authorities Cited

	Page
Constitution of the United States, Fourteenth Amendment	8
Revised Zoning Ordinance for Wayne Township, New Jersey, dated July 12, 1949:	
Section 1	3
Section 2	3
Section 3(d)	4
Section 4(a)	4
Section 4(d)	4
Section 5(e)	5
Section 6(b)(1)	5
United States Code, Title 28, Section 1257(2)	2, 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 429

LIONSHEAD LAKE, INC., A NEW JERSEY CORPORATION,
Appellant,

vs.

TOWNSHIP OF WAYNE, A MUNICIPAL CORPORATION OF THE COUNTY OF PASSAIC AND STATE OF NEW JERSEY

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, Lionshead Lake, Inc., a New Jersey corporation (hereinafter referred to as the Appellant) submits herewith its statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of New Jersey entered in this cause on June 26, 1952.

Opinions Below

The opinion of the Superior Court of New Jersey, Law Division, Passaic County, is reported at 13 N. J. Super 490. A copy of this opinion is attached hereto as Appendix A. The opinion of the Supreme Court of New Jersey is re-

ported at 89 A. (2d) 693. A copy is attached hereto as Appendix B.

Jurisdiction

The jurisdiction of the Supreme Court to review by appeal the judgment entered in this cause is conferred by 28 U.S.C. Sec. 1257. The final judgment of the Supreme Court of New Jersey sought to be reviewed was entered June 26, 1952.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case:

King Manufacturing Co. v. *City of Augusta*, 277 U. S. 100, 114;
Jamison v. *Texas*, 318 U. S. 413;
Independent Warehouse, Inc., v. *Scheele*, 331 U. S. 70, 79;
Kunz v. *New York*, 340 U. S. 290, 292;
Adler v. *Board of Education*, 342 U. S. 485, 487.

Question Presented

Whether, where a large tract of one thousand building sites in area 50 x 100 have been platted with a view to sale for and building and sale thereon of low-cost dwellings and where, of the one hundred houses so far built in said development fifty percent thereof presently have a floor space of less than 768 square feet, a municipal ordinance passed subsequent to such platting, development and building and embracing all of a township of some twenty-five square miles without exception and without regard to character of particular districts or suitability for particular purposes and imposing minimum floor space areas for all dwellings in said township of 768 square feet for single-floor dwellings and 1200 square feet for two-floor dwellings is so arbitrary

and unreasonable as to constitute a taking of private property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Statute Involved

The pertinent provisions of the Revised Zoning Ordinance for Wayne Township, New Jersey, adopted July 12, 1949, are as follows:

SECTION 1. DISTRICTS CREATED.

For the purposes of this ordinance, the Township is divided into the following four classes of districts:

RESIDENCE "A" DISTRICTS
RESIDENCE "B" DISTRICTS
BUSINESS DISTRICTS
INDUSTRIAL DISTRICTS

The boundaries of these districts shall be as shown on the Zoning Map of Wayne Township which accompanies and is hereby declared to be a part of this ordinance.

From the date of this ordinance, all buildings and other structures and all uses of buildings and other structures shall conform to the requirements and regulations of the district in which such buildings or structures are located and in which such uses are conducted, except that buildings or structures and uses already existing contrary to the regulations prescribed by this ordinance may be continued but shall be designated as "non-conforming" and shall be subject to the special regulations herein provided in respect to them.

* * * * * * *

SECTION 2. DEFINITIONS.

* * * * * * *

Living-Floor space—Floor space used for general living purposes, measured from the wall exteriors. Attic space with a ceiling height of 7 feet or more and

sloping to a height at the eaves of not less than 4 feet from the floor to the underside of the rafters may be counted as living-floor space. The floor of a basement or cellar, garage, porch, or similar part of or attachment to a dwelling shall not be counted as living-floor space.

SECTION 3. RESIDENCE "A" DISTRICTS.

* * * * * * *

(d) MINIMUM SIZE OF DWELLINGS:

Every dwelling hereafter erected or placed in a Residence "A" District shall have living-floor space, as herein defined.

of not less than 768 square feet for a one story dwelling;

of not less than 1000 square feet for a two story dwelling having an attached garage;

of not less than 1200 square feet for a two story dwelling not having an attached garage.

For the purpose of this section the second floor shall have a ceiling height of not less than 7 feet, measured at the eves from the floor to the underside of the rafters.

SECTION 4. RESIDENCE "B" DISTRICTS.

(a) PERMITTED STRUCTURES AND USES:

Buildings, structures and uses and land uses permitted in Residence "B" Districts shall be the same as for Residence "A" Districts.

* * * * * * *

(d) MINIMUM SIZE OF DWELLINGS:

Requirements shall be the same as for Residence "A" Districts.

SECTION 5. BUSINESS DISTRICTS

* * * * * * *

(e) MINIMUM SIZE OF DWELLINGS:

Requirements shall be the same as for Residence "A" Districts.

SECTION 6. INDUSTRIAL DISTRICTS.

* * * * * * *

(b) OTHER REGULATIONS:

All other regulations shall be the same as for Business Districts, except:

1. For buildings to be used entirely for dwelling purposes, requirements shall be the same as for Residence "B" Districts.

The minimum area fixed for Residence "A" Districts is 10,000 square feet and a width of not less than 75 feet. For Residence "B" Districts the minimum area of the lot is fixed at 5,000 square feet and a width of not less than 50 feet, provided said lot is designated on a plat heretofore approved by the Township Committee and filed in the Office of the Register of the County of Passaic.

Statement

Appellant filed a complaint in the Superior Court of New Jersey, Law Division—Passaic County, on August 6, 1950, alleging that it is the owner of numerous parcels of land in a large tract of land owned and developed by it, known as Lionshead Lake, and located in Wayne Township, Passaic County, New Jersey. It alleged the erection of about 100 one-family houses on lands set out on a map of Lionshead Lake dated 1946, and approved by the Defendant and filed

in the Office of the Register of Passaic County. It further alleged the passage on July 12, 1949, of a revised zoning ordinance by the Township Committee, requiring that every dwelling thereafter erected in the township shall have minimum living space of not less than 768 square feet for one-story dwellings, 1,000 square feet for two-story dwellings having attached garage, and 1,200 square feet for dwellings having no attached garage.

The federal question was raised in the complaint—The complaint alleged that the ordinance:

> "constitutes a taking of private property without due process of law; and is otherwise illegal under the laws of the State of New Jersey and the Constitution of the United States."

No inhibiting provision of the New Jersey Constitution was invoked; indeed, the New Jersey Constitution includes no due process clause. The validity of the ordinance was thus drawn in question on the grounds of its repugnancy to the due process clause of the Federal Constitution within the purview of 28 U.S.C., Sec. 1257 (2).

The complaint prayed judgment vacating and setting aside the provision fixing the minimum size of dwelling and decreeing the same to be null and void and particularly so far as it affects the properties of the plaintiff.[1]

After trial, the Superior Court held the minimum size of dwelling provision arbitrary and unreasonable and not within the domain of the police powers of the municipality. Accordingly, it entered judgment, holding the minimum size of dwellings provisions invalid with respect to Residential "A" and Residential "B" Districts in which plaintiff's property is located (see Appendix A, attached).

---

[1] A Second count related to classification of property, but is not now involved.

The federal question was raised in the Supreme Court of New Jersey and necessarily decided by that Court.—The defendant sought review of the trial court's decision by petition for certification (similar to the certiorari jurisdiction of this Court). That petition quotes from the allegations of the Complaint the same language quoted above as to violation of the due process clause of the Federal Constitution. It further states:

> "The Questions Presented:
>
> 1. Are the provisions of defendant's zoning ordinance prescribing a minimum size for dwellings repugnant to the State or Federal Constitution?"

The petition pointed out that the plaintiff's counsel had signed a consent to certification. The so-called consent states that counsel for the plaintiff "joins the Defendant-Petitioner in requesting the Supreme Court of New Jersey to grant certification in this case." Plaintiff thus joined in urging the Federal Constitutional question in the State Supreme Court.

Certification was ordered by the Supreme Court of New Jersey as appears from its Opinion (see Appendix B, p. 1), and the same Question presented was reiterated in the Defendant-Appellant's brief in the Supreme Court of New Jersey.

After argument, the Supreme Court of New Jersey, reversed, holding that under the State Constitution and statutes the municipality had authority to impose the minimum floor area requirements. On the question of reasonableness it held that the provisions of the ordinance were justified as safeguards against deterioration of land values and character of neighborhood. By clear intendment both in the trial court and in the Supreme Court of New Jersey, the appellant's claim that the ordinance violates

the due process clause couched in the language of the Fourteenth Amendment to the Federal Constitution and in the absence of a comparable state constitutional provision adequately presented the Federal question; and the necessary effect of the judgment of the Supreme Court of New Jersey was to deny the claim that the ordinance was repugnant to the due process clause of the Fourteenth Amendment. *Bryant* v. *Zimmerman*, 278 U. S. 63, 67; *Copperweld Steel Co.* v. *Industrial Commission of Ohio*, 324 U. S. 780, 785.

In pertinent substance, the evidence showed:

The appellant, Lionshead Lake, Inc., a New Jersey Corporation, in 1939 acquired a large tract of land known as Lionshead Lake. As a condition of the purchase the zone was changed under existing law to permit building plots of 50 x 100 feet. In the same year, after such change, appellant surveyed and platted the property in lots 20 x 100 feet, which were sold in minimum units of 2½ lots. The area included a total of about 1000 building plots. The Corporation dammed a stream to create a lake of more than 140 acres and a bathing beach, installed a private water system, and arranged for other utilities. Small houses of about 484 square feet, for both summer and year-round occupancy were erected with emphasis on log cabin style. They were in three basic sizes. The smallest, totaling 484 square feet, contained a living room of 160 square feet, a kitchen of 85, and a bedroom of 100 square feet, a bathroom with stall shower. The largest, 676 square feet, contained a living room 14 x 16, a bedroom 12 x 16, and a kitchen and second bedroom about 12 x 12. A smaller four-room house included a little less than 600 square feet.

The community was set up as a low cost housing development. Great stress was placed on the fact that purchasers could buy a small place, go into possession and later make

additions. In a number of cases, such additions have been made.

Most of the Lionshead Lake development is in the Residential "B" District requiring a minimum of only 5000 square feet for a building plot. The remainder in Residential "A" is relatively small. Between 25 and 30 percent of the total area of the development is still owned by the appellant. About 80 percent of the roads, fifty feet wide, have been bulldozed and surfaced (70 percent with gravel, 30 percent with asphalt). Water mains and electricity are installed in most of the area.

After World War II, log cabin siding being unavailable, appellant built small Cape Cod houses, 22 x 22 feet in overall dimensions, which met the room size requirements of, and were financed under FHA. These houses, which had a total floor space area of only 484 square feet, contained a living room 14 ft. 3 inches x 11 ft. 6 inches, a bedroom 16 feet x 9 feet 6 inches, a bedroom 11½ feet x 6¾, a bathroom and closet room. In 1945 the Company sold seventy plots and two houses, in 1946 one hundred twenty-five plots and one house, in 1947 about seventy plots and eight houses, in 1948 fifty plots and twenty houses, in 1949 seven plots, in 1950 about one hundred plots.

As of the time of the trial, 70 of the 94 houses in the Lionshead Lake Development did not comply with the ordinance. Fourteen under construction also will comply. The sale prices of the lots in this development varied between $825 and $1500 and averaged between $1000 and $1200.

The minimum floor space provision applies to the township as a whole and without exception. The township of Wayne, three miles northwest of Paterson, New Jersey, has a population of about 11,000. Twenty-five different residential developments can be counted and the built up

portions of the township constitute twelve percent of the total area. The present property values range from houses costing $30,000 to $75,000 in certain areas down to the low cost houses in Appellant's development.

The town building inspector testified that at the time the ordinance was adopted, he examined permits for the prior year and found the majority in one scale to be for houses around 24 feet x 32 feet. He told the Planning Board, of which he was also a member, of that size and thought it was reasonable because it permits use of standard size lumber. That was the basis on which the Planning Board's recommendation to the Town Committee of the 768 square feet minimum was arrived at. He further testified that in the two-story house minimum, although 1200 square feet is prescribed, the minimum of 1000 square feet is permitted where there is an attached garage because it makes a better looking house.

Construction of a house of the minimum size under the ordinance with land and utilities would have cost $9500 to $10,500 in 1949 and $11,000 to $12,000 now. Only 30% of the population can afford houses costing more than $10,000.

The Defendant adduced testimony of a specialist in public health that the healthfulness of houses "depends on the effect of the home on emotional health"; that "the sense of inferiority due to living in noticeable sub-standard homes probably does more damage to the health of children than all the unsanitary plumbing.[2]

---

[2] This was amplified by the witness:

"The home is a place to live in and the conflict between the desires and wishes of the members who are crowded together, the stress and strains that develop in the housekeeper as the result of performing household tasks, which have been estimated as involving about 66 hours a week in an individual home, the interference between the desires of the different members of the family who are crowded together into a single room, some trying to study, children perhaps trying to

He recognized that size of dwelling must depend on size of family. However, he testified to elaborate computations on which he based conclusion that one person requires 400 square feet, two persons 750 square feet, three persons 1000 square feet, four persons 1150 square feet, five persons 1400 square feet and six persons 1550 square feet.

In contrast to his detailed testimony as to "emotional health" (see Footnote 1, *supra*) he stated he was not in favor of specifying size of rooms; that for two persons in a house of 768 square feet with only the bathroom separate, the absence of division was not important and in a house for six, to have only a living room, a tiny kitchen and bathroom would be bad because not more than two persons should sleep in the same room.

The public health witness also testified that the best of the public housing building up to 1949 is 20 percent below his figures in space and that his figures are goals rather than legal standards. He testified that the largest part of his determinations had to do with the "emotional health" factor. He also testified that the number of occupants is the essential factor in determining minimum space requirements.

Aside from the asserted emotional health factor, the only other ground asserted by the Defendant to justify the ordinance was enhancement of land values. The only testimony thereon, that of a City Planning Firm member, was to the effect that the minimum floor space of 768 square feet was very important from the standpoint of preservation and conservation of property values. He based this on the explanation that the average house will be in the community requiring community services for many years, but owner-

---

study, someone else trying to listen to the radio, someone else trying to entertain guests, I have become convinced that this total group of problems affecting mental and emotional health are related most essentially and are a vital element in the hygiene of housing."

ship will change and the number of persons living in the house will change from two, to three, to four persons, and there is no power to make people move out if another child is born. The standard fixed is a minimum for a two-person family.

It was also shown by the Defendant that of 138 municipalities in the State replying to questionnaire, 64 now have minimum floor space requirements in their zoning ordinances and 21 of these have but one requirement for all zones; 43 have a sliding scale. The Defendant's evidence also showed that there are neighboring townships that have no minimum floor space area requirement.

On this evidence the trial court held that the minimum size requirement was amply demonstrated to have no reasonable relation to public health or general welfare (See App. A, p. —).

The Supreme Court opinion (per Vanderbilt, C. J.) sustained the abstract power of the municipalities to impose minimum floor area requirements. As to mental and emotional health considerations the Court referred to overcrowding as a reason for divorce. It also said that suburban residents rightly expect more land and living room than is fixed by city standards.

On reasonableness in view of the particular facts, however, it sustained the ordinance solely on the ground of protection against deterioration of land value by avoidance of danger of erection of shanties.

The two dissenting judges pointed out: (1) a zoning provision involving such economic segregation "runs afoul of our form of Government," (2) it unnecessarily restricts alienation of real estate," (3) it gives no consideration whatsoever to the character of the district and its peculiar suitability for particular purposes and is therefore arbitrary and capricious.

The Question Is Substantial

It is submitted that the Superior Court of New Jersey clearly erred in holding the zoning ordinance of Wayne Township as applied to appellant's lands therein does not violate the due process clause of the Fourteenth Amendment. Protection of the public interest, including public health, safety, morals and the public welfare has long been recognized as the rightful exercise of the zoning power. It is basic, however, that the police power must be exercised to protect the public interest. The Fourteenth Amendment has heretofore been deemed to protect against zoning which changes the basic character of use of private property not in pursuit of the public interest and merely for the selfish advantage of other individual owners.

Here the character of the large area owned by plaintiff has been established as a low-cost housing development by a large number of residences erected by appellant, and has been relied upon by numerous purchasers of lots.

The defendant's evidence purporting to justify the regulation as promoting emotional health, on its face, renders that contention specious. The multiplicity of activities in one room—the main cause of impairment of emotional health according to the defendant's witness—is in no way obviated by, and has no relation to, the provision in question since the ordinance sets up no requirement as to minimum number of rooms. Neither does the regulation have any relation to avoidance of overcrowding. The minimum floor space areas established by the ordinance are not related to the number of occupants.

The record is clear that no considerations of physical health are involved or even asserted. On the contrary, it seems plain that removal of a family from a city apartment to a house of no smaller floor area in the open country would be highly beneficial.

Apparently recognizing that on the evidence in this case protection of emotional health could not be relied upon to sustain the ordinance, the court below justified the ordinance as reasonable solely on the stated ground that it will protect against "the erection of shanties which would deteriorate land values generally". This makes it plain that the preservation of the "character" of the neighborhood, in which the court finds justification for the ordinance, flows only from avoidance of potential injury to the aesthetic sense. It has long been recognized that mere aesthetic considerations alone cannot justify the exercise of the police powers. *Welch v. Swasey*, 214 U. S. 91, 107-108; *Brougher* v. *Board of Public Works*, 107 Cal. App. 15 (1930); *Ayer* v. *Commissioners*, 242 Mass. 30 (1922); *Main Street Corp.* v. *Brockton*, 323 Mass. 646 (1949); *Wulfsohn* v. *Burden*, 241 N. Y. 288 (1925). Zoning ordinances may further the public welfare by stabilizing property values, but only as an incident to achievement of one or more of the purposes recognized as legitimate exercise of the police power. *Lincoln Trust Co.* v. *Williams Building Corporation*, 229 N. Y. 313.

In *Euclid* v. *Ambler Realty*, 272 U. S. 365, this court studiously avoided reliance on the possible advantage of maintaining or increasing property values, as a permissible basis for the zoning ordinance.

A similar minimum floor space ordinance was held invalid in the light of these principles in *Senesky* v. *Lawler*, 307 Mich. 728. It was pointed out that mere aesthetic considerations cannot justify imposition of larger floor space requirements, particularly where one-third of the residences are nonconforming, even though less than half of the building lots are occupied.

The decision below presents a clear challenge and a definite step beyond what has heretofore been recognized

as justifiable invasion of individual property rights under the zoning powers.

More alarming in its callous implication is the reasoning of the court below:

> "Moreover, people who move into the country rightly expect more land, more living room, indoors and out, and more freedom in their scale of living than is generally possible in the city. City standards of housing are not adaptable to suburban areas, and especially to the upbringing of children." (Appendix B, p. 6)

The township has already recognized lots of 5000 square feet as proper. But aside from that, the statement establishes the principle that those of lesser economic ability are rightly to be denied the benefits of suburban living.

Solely on aesthetic considerations, the Opinion of the court below thus bars from any of the benefits of suburban life those who cannot aspire to the generally higher scale of living envisioned by the court as an incident thereof.

This, like racial segregation, cannot be justified under the police power.

It is submitted that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

(S) Albert L. Reeves, Jr.
(S) William D. Donnelly
Counsel for Appellant.

Cummings, Stanley, Truitt & Cross,
Washington, D. C.
Reuben P. Goldstein,
921 Bergen Avenue,
Jersey City, New Jersey.
Of Counsel.

APPENDIX "A"

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

Passaic County

OPINION

(Filed—April 27, 1951)

(Reported 13 N. J. Super. 490)

REUBEN P. GOLDSTEIN, Esq.,
Attorney for Plaintiff.
ARCHIBALD KREIGER, Esq.,
Of Counsel.
MARKLEY & BROADHURST, Esqs.,
Attorneys for Defendant.

This proceeding in lieu of prerogative writ seeks to set aside the provisions of the zoning ordinance of the Township of Wayne with respect to the minimum size requirements of dwellings, plaintiff charging that the ordinance is unreasonable and constitutes an invalid exercise of the police power of the municipality.

The matter came before this Court some time ago on motion for summary judgment and its then determination is reported in 8 N. J. Super. 468, the Appellate Division, however, holding in 9 N. J. Super. 83 that summary judgment was precluded, as a factual issue had been properly presented.

After a painstaking inquiry into the facts, it is difficult to perceive any genuine or material dispute. On July 12, 1949, defendant adopted a revised zoning ordinance covering the entire township, which was to be divided into four districts, namely, Residence District "A", Residence District "B", Business District and Industrial District. The ordinance, under Section 3, subdivision (d), "Minimum Size of Dwellings", provided that:

> "Every dwelling hereafter erected or placed in a Residence 'A' District shall have a living-floor space, as

herein defined, of not less than 768 square feet for a one-story dwelling; of not less than 1,000 square feet for a two-story dwelling having an attached garage; of not less than 1,200 square feet for a two-story dwelling not having an attached garage. For the purpose of this section the second floor shall have a ceiling height of not less than 7 feet, measured at the eaves from the floor to the underside of the rafters."

As the same requirement for minimum size of dwellings is set forth for Residence "B" Districts under Section 4, paragraph (d), and by specific reference is incorporated in Business Districts under Section 5, paragraph (e), and Industrial Districts under Section c, paragraph (b)-1, the result is that a uniform minimum size of dwellings, in accordance with the standards particularly described for Residence "A" Districts, as above set forth, prevails throughout the entire municipality.

N. J. S. A. 40:55-30 provides that:

"Any municipality may by ordinance, limit and restrict to specified districts and may regulate therein, buildings and structures according to their construction, and the nature and extent of their use, and the exercise of such authority, subject to the provisions of this article, shall be deemed to be within the police power of the state. * * *

"The authority conferred by this article shall include the right to regulate and restrict the height, number of stories, and sizes of buildings, and other structures, the percentage of lot that may be occupied, the sizes of yards, courts, and other open spaces, the density of population, and the location and use and extent of use of buildings and structures for trade, industry, residence, or other purposes."

N. J. S. A. 40:55-32 clearly provides the basis for a proper determination of the present controversy, and it reads as follows:

"Such regulations shall be in accordance with a comprehensive plan and designed for one or more of

> the following purposes: to lessen congestion in the streets; secure safety from fire, panic and other dangers; promote health, morals or the general welfare; provide adequate light and air; prevent the over-crowding of land or buildings; avoid undue concentration of population. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality."

Through the years there has been a gradual broadening in the legal concept of valid zoning restrictions, and, as was held in *Duffcon Concrete Products* v. *Borough of Cresskill*, 1 N. J. 509, at page 513:

> "What may be the most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing within the municipality and its needs, present and reasonably prospective, but also on the nature of the entire region in which the municipality is located and the use to which the land in that region has been or may be put most advantageously."

This goes beyond a finding based strictly on the police power, other than general welfare, and establishes a test grounded in the community use of the land in the municipality, with due consideration to all general conditions and needs, present and reasonably to be anticipated in the region. It is, accordingly, necessary to obtain a broad perspective of the municipality and the region in which it is located.

The Township of Wayne is in the County of Passaic, lies generally about three miles northwest of the City of Paterson, and embraces an area of 25.34 square miles, with a population of 11,000. The municipality includes several sizeable lakes within its borders, the one on plaintiff's property comprising 145 acres, and there are a large number of summer or vacation homes and a number of dwellings

occupied only during the summer months. Originally a farming section, there are now real estate developments and subdivisions, some business and light industry, little heavy industry, and generally it may be considered a rather widely scattered and sparsely settled residential community, the evidence establishing that the built-up portion constitute about 12% of the area of the township.

Plaintiff, attacking the zoning ordinance as unreasonable, is met by a presumption that the ordinance is reasonable and for the public good, and he must bear the burden of establishing the contrary. *Brandon* v. *Montclair*, 124 N. J. L. 135, affirmed 125 N. J. L. 367; *Lumund* v. *Bd. of Adjustment of the Borough of Rutherford*, 4 N. J. 577.

The minimum size requirement throughout the defendant municipality for a one story dwelling under the ordinance now questioned is 768 sq. ft., indicating a normal 24 ft. x 32 ft. building, and the cost of erection is from $11,000 to $12,000 mass produced, and 20% more for individual construction, and the testimony, confirming general acceptance, is that but 30% of the population can afford homes costing over $10,000, the remaining 70% being necessarily restricted to the purchase of homes costing less than that figure.

The ordinance, in its present form, therefore practically provides that no house costing less than a certain sum may be erected in the entire community, let alone a specified area, and this it cannot legally do. *Brookdale Homes, Inc.* v. *Johnson*, 123 N. J. L. 602; affirmed N. J. L. 516. No person under the zoning power can legally be deprived of his right to build a house on his land merely because the cost of that house is less than the cost of his neighbor's house. *Ibid.*

Dwellings are erected on about a dozen widely separated areas, ranging all the way from a sparsely settled community along the river, known as Riverview, to highly developed, costly and exclusive communities, such as Ridgewood Acres, Preakness Park Manor and Pines Lake, where the homes cost from $30,000 to $75,000.

In the several residential communities the dwellings which meet or exceed the specified square footage minimum

requirement range from 50% to 100%. As a practical matter, it is pertinent to note that the building inspector, produced as a witness for defendant, testified that from the time he assumed office on January 1, 1946 to the adoption of the ordinance on July 12, 1949, he issued 1305 building permits, and but 67 were for dwellings of less than 768 sq. ft.

In the entire defendant township about 70% of the dwellings meet or exceed the minimum square footage requirement of the ordinance under attack, and the remaining 30% are below. While plaintiff produced no recognized public health expert, the testimony indicated no direct connection between health and square footage, except as to provision for adequate sanity and sewerage services, which, of course, are regulated and controlled by other municipal ordinances.

The New Jersey Code of Minimum Construction Requirements for One and Two Family Dwellings provides that:

> "Living rooms shall have an area not less than 150 square feet, or not less than 160 square feet when dining space is included and not less than 220 square feet when dining and cooking space is included, provided that this area shall be not less than 210 square feet when located in a dwelling unit having less than two bedrooms.
>
> "The area of kitchens shall be not less than 60 square feet, or not less than 90 square feet when dining space is included, provided that the area of the kitchen shall be not less than 50 square feet when located in a dwelling unit having less than two bedrooms.
>
> "The area of at least one bedroom in each dwelling unit shall be not less than 100 square feet.
>
> "The area of any other bedroom in the same unit shall be not less than 70 square feet."

These figures are indicative of accepted minimums for adequate housing with less square footage than the ordinance requires.

It is settled that an ordinance under the Zoning act must bear a reasonable relation to the powers conferred by that

act. *Phillips* v. *Township Council, &c.*, Teaneck, 120 N. J. L. 45, 48; 198 Atl. Rep. 368; affirmed, 122 N. J. L. 485; 5 Atl. Rep. (2d) 698. Restrictions imposed pursuant to the Zoning act must tend at least in some degree to promote the public good; they must bear a "substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *Nectow* v. *Cambridge*, 277 U. S. 183; 72 L. Ed. 842; *Gabrielson* v. *Glen Ridge*, 13 N. J. Mis. R. 142; 176 Atl. Rep. 676; *Phillips* v. *Township Council, &c., Teaneck, supra; Phillips Oil Co.* v. *Municipal Council &c., Clifton*, 120 N. J. L. 13; 197 Atl. Rep. 730; 179 *Duncan Avenue Corp.* v. *Jersey City*, 122 N. J. L. 295; 5 Atl. Rep. (2d) 68; *Sour Distributing Co., Inc.* v. *Bridgeton*, 122 N. J. L. 460; 6 Atl. Rep. (2d) 192. (Cf. *Resciniti* v. *Board of Commissioners, Belleville*, 117 N. J. L. 1; 186 Atl. Rep. 439; *Watchung Lake, Inc.* v. *Mobus*, 119 N. J. L. 272; 196 Atl. Rep. 233.)

Thus while our legislature has unquestionably given municipalities the right to pass ordinances "to regulate and restrict the height, number of stories, and sizes of building," such ordinances to be valid must be designed to promote public health, safety, and general welfare. R. S. 40:55-30. The mere power to enact an ordinance such as the one here involved does not carry with it the right arbitrarily or capriciously to deprive a person of the legitimate use of his property. *Brookdale Homes, Inc.* v. *Johnson, supra.*

Defendant municipality charges that plaintiff's action is premature in that it has not appealed to the Board of Adjustment and exhausted its remedy, but this is a proper attack upon the validity of the zoning ordinance and the defense is without merit. *Lionshead Lake, Inc.* v. *Wayne*, 9 N. J. Super, 83.

We are not here concerned with plaintiff's individual plight as it relates to the effect of the zoning requirements upon the operation of its real estate development, for it is beyond dispute that regardless of personal interest or potential financial loss, every landowner is subject to the control of his property for the public good. "The touchstone of the reasonableness of the control is to be found

in the relation of the regulation to the health, safety, morals, or the general welfare of the community." *Collins* v. *Board of Adjustment of Margate City*, 3 N. J. 200, at p. 206 (1949). Reasonableness is a fact question. *American Grocery Co.* v. *New Brunswick*, 124 N. J. L. 293 (Sup. Ct. 1940; affirmed 126 N. J. L. 367 (E. & A. 1941).

Defendant, recognizing the legal situation contends that the reasonableness of the control now questioned, specifically the minimum square foot dwelling requirement throughout the entire municipality, is based on the relation of the regulation to the health of the general welfare of the community, and with this contention, after revealing the factual question, I cannot agree.

While defendant produced an outstanding and nationally known public health expert, his testimony in my judgment, materially substantiated plaintiff's position, for he based his observations, not upon physical health in the ordinary and generally accepted sense of the words, but upon what he termed "emotional health," a sense of inferiority due to living in a sub-standard home. He fixed a minimum requirement essential to healthful living of 400 sq. ft. for one person, 750 sq. ft. for two persons, 1000 sq. ft. for three persons, 1150 sq. ft. for four persons, 1400 sq. ft. for five persons, and 1550 sq. ft. for six persons, stating that these were not suggested as legal standards, but goals at which to aim. He freely acknowledged that physiological and emotional needs were the essentials considered, that 750 sq. ft. (slightly below the ordinance requirement) was adequate for two persons, and that the Federal space requirements were about 20% less than his figures. As the average family is comprised of 3.6 persons, defendant rather uniquely theorizes that all dwellings should be constructed for such occupancy. This would seem to require no comment.

Plaintiff's operations are concerned with three-room cottages in which the living room contains 160 sq. ft., the bedroom 100 sq. ft. and the kitchen 85 sq. ft., the body of the house totalling 484 sq. ft., exclusive of the porch; four-room cottages comprising a living room 14 x 17 feet, one bedroom 12 x 17 feet, a second bedroom 12 x 12 feet and kitchen

12 x 12 feet, making a living space area of 676 sq. ft., exclusive of the porch; and smaller four-room cottages just under 600 sq. ft., each home containing modern bath and adequate sanitary facilities, all individually styled, extremely attractive in general appearance, and wholly in keeping with their rustic surroundings; they present no health problem and are in no sense detrimental to the community.

While the evidence establishes that homes for five or six persons, presumably requiring dwellings in excess of 1400 sq. ft., would necessitate a plot size increase, the ordinance makes no such provision and permits the larger structure on the same 500 foot plot; another section of the ordinance provides that a building with attached garage must have 1000 sq. ft. of living space, while with no such garage, the minimum requirement is 1200 sq. ft., defendant's witness, the building inspector, stating that the reason was that the attached garage made for a better looking building; the evidence further established that the reason for the ordinance standard of a 24 x 32 foot structure with a content of 768 sq. ft. was the average for building applications and that standard dimensions of lumber were readily adapted to that size. Obviously, these considerations are wholly unrelated to either public health or the general welfare of the community.

The holding in *Duffcon Concrete Products, Inc.* v. *Borough of Creskill*, supra, wherein our Supreme Court sustained an ordinance excluding heavy industry from the municipality, was clearly justified under the facts; so, too did the facts in *Guaclides* v. *Borough of Englewood Cliffs*, 11 N. J. Super. 405, amply support the validity of an ordinance prohibiting multi-family dwelling districts within the borough.

Here the factual situation, in my opinion, amply demonstrates that the minimum size requirement for one story dwellings is not reasonably related to the public health or general welfare of the community, but is arbitrary and unreasonable and not within the domain of the police powers of the defendant municipality.

While the Court is loath to interfere in the internal affairs of any municipality and cannot, of course, properly substitute its judgment for that of duly elected and authorized representatives, I am forced to the conclusion that the provisions in the zoning ordinance respecting "Minimum Size of Dwellings" are wholly invalid with respect to Residence "A" and "B" Districts, in which plaintiff's property is situated, and must be set aside.

Dated: April 27, 1951.

ROBERT H. DAVIDSON,
A. J. S. C.

APPENDIX "B"

SUPREME COURT OF NEW JERSEY

LIONSHEAD LAKE, INC.

v.

WAYNE TOWNSHIP

Argued Feb. 11, 18, 1952

Reargued June 16, 1952

Decided June 26, 1952

On appeal from the Law Division of the Superior Court, certification to this court granted on the appellant's petition.

Edward A. Markley and James J. Langan, Jersey City, argued the cause for appellant (Markley & Broadhurst, Jersey City, attorneys; Frederic G. Stickel, III, Cedar Grove, on the brief).

Reuben P. Goldstein, Jersey City, argued the cause for respondent.

The opinion of the court was delivered by

VANDERBILT, *C. J.*

The plaintiff, the owner and developer of a large tract of land in the defendant township, commenced this action in lieu of a prerogative writ challenging the validity of the

defendant's zoning ordinance in fixing the minimum size of dwellings and in placing certain of its properties in a residential district. On the plaintiff's motion the trial court entered summary judgment in its favor on the first count, setting aside the provisions of the ordinance fixing the minimum size of dwellings, Lionshead Lake, Inc. v. Wayne Tp., 8 N. J. Super. 468, 73 A. 2d 287 (Law Div. 1950). On appeal this judgment was reversed by the Appellate Division of the Superior Court because of the existence of a factual question and the case was remanded for trial, Lionshead Lake, Inc. v. Wayne Tp., 9 N. J. Super. 83, 74 A. 2d (App. Div. 1950).

The Township of Wayne is the most extensive municipality in Passaic County. It covers 25.34 square miles in comparison with the 23.57 square mlies of Newark. It has a population of 11,815 in comparison with Newark's 437,857. Only 12% of the total area of the township has been built up. Included within its borders are several sizeable lakes (the one located within the plaintiff's development, e.g., having an area of about 145 acres) and as a result a considerable number of its residences have been built for summer occupancy only. Although a political entity it is in fact a composite of about a dozen widely scattered residential communities, varying from developments like the plaintiff's where the average home costs less than $10,000, to more expensive sections where the homes cost from $35,000 to $75,000. It has but little business or industry.

On July 12, 1949, four years after the plaintiff had commenced the development of its Lionshead Lake properties and after over a hundred houses had been constructed there, the defendant adopted a revised zoning ordinance dividing the entire township into four districts; residence districts A and B, a business district and an industrial district, the last two comprising but a very small proportion of the township's total area. In section 3 of the ordinance pertaining to residence A districts it was provided that:

"(d) Minimum Size of Dwellings:

"Every dwelling hereafter erected or placed in a residence A District shall have a living-floor space, as herein defined.

"of not less than 768 square feet for a one story dwelling;

"of not less than 1000 square feet for a two story dwelling having an attached garage;

"of not less than 1200 square feet for a two story dwelling not having an attached garage."

These minimum size requirements for dwellings were made applicable to residence B districts by section 4(d) of the ordinance, to business districts by section 5 (c), and to industrial districts by section 6 (b) 1, the result being that the same minimum size requirements for dwellings prevail throughout the entire township.

Within the entire township only about 70% of all the existing dwellings meet the minimum requirements of the ordinance; in some sections of the township as few as 20% of the existing dwellings comply with the ordinance requirements, in others (among them the plaintiff's Lionshead Lake development) only about 50% are above the prescribed minimum, while in other areas the percentage of compliance is far greater, reaching 100% in some of the more exclusive sections. The low percentage of compliance in certain areas is not particularly significant, however, for the reason that the township is as yet substantially undeveloped. Compliance with the requirements of the ordinance in the future will undoubtedly result in the nonconforming houses comprising but a small minority even in those areas where they are now in the majority. There was testimony to the effect that to build a house for year-round occupancy having the minimum 768 square feet of living space would cost from $10,000 to $12,000, if mass produced, and that only about 30% of the population were financially able to afford such homes. The plaintiff's witness who so testified, a builder and developer, was hardly qualified, however, to express an opinion as to the financial ability of present and potential residents of the township and his opinion as to construction costs was considerably out of line with that of the defendant's expert who testified that homes complying with the ordinance could be and were being built at a

cost of $8,500 to $9,200 if for year-round occupancy and $7,500 to $8,200 if for seasonal use only.

To meet the plaintiff's attack on the reasonableness of the ordinance the defendant produced a recognized public health expert, who testified that the living-floor space in a dwelling had a direct relation to the mental and emotional health of its occupants and that he had developed scientific standards for different size families: 400 square feet for one person, 750 square feet for two persons, 1,000 square feet for three persons, 1,150 square feet for four persons, 1,400 square feet for five persons and 1,550 square feet for six persons. These the witness considered as desirable goals rather than legal standards. He conceded that the housing standards prescribed by the agencies of the Federal Government are below those written into the ordinance, as are those of the New Jersey Code of Minimum Construction Requirements for One and Two Family Dwellings, prepared by the Department of Economic Development, Division of Planning and Engineering (1946), which, however, does not have the force of law but is merely advisory.

After considering this and other evidence the trial court, 13 N. J. Super. 490, 80 A.2d 650 (1951) concluded that the minimum size requirements of the ordinance were not reasonably related to the public health, were arbitrary and unreasonable, and not within the police powers of the defendant. Accordingly judgment was entered on the first count of the complaint in favor of the plaintiff setting aside the minimum size of dwelling requirements with respect to the residence A and residence B districts in which the plaintiff's property is located. The plaintiff failed to introduce any proof in support of the second count of its complaint in which it objected to the placing of its property in a residential zone. The court therefore granted the defendant's motion for a dismissal thereof with prejudice, but subsequently declined to enter formal judgment to that effect. On the petition of the defendant we granted certification to review the judgment of the trial court with respect to the first count and its refusal to enter judgment with respect to the second count.

The zoning powers of the municipalities have been extended by Art. IV, Sec. VI, par. 2 of the Constitution of 1947:

> "The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the legislature."

The zoning statutes then in effect were amended by Chapter 305 of the Laws of 1948 to give effect to the expansion of the zoning power contemplated by the addition, of the italicized words to the corresponding provision of the 1844 Constitution (Art. IV, Sec. VI, par. 5). Moreover, by Art. IV, Sec. VII, par. 11 of the Constitution of 1947, which had no counterpart in the 1844 Constitution, we are required to construe the constitutional and statutory provisions pertaining to zoning liberally in favor of a municipality:

> "The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law."

When the enabling zoning statutes, R. S. 40:55-30 and 31, N.J.S.A., both as amended by chapter 305 of the Laws of 1948, supra, and R. S. 40:55-32, N.J.S.A., are read in the light of the constitutional mandate to construe them liberally, there can be no doubt that a municipality has the power by a suitable zoning ordinance to impose minimum

living-floor space requirements for dwellings. N.J.S.A. 40:55-30 provides:

> "Any municipality may by ordinance, limit and restrict to specified districts and may regulate therein, buildings and structures according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority, subject to the provisions of this article, shall be deemed to be within the police power of the State. * * *
>
> "The authority conferred by this article shall include the right to regulate and restrict the height, number of stories, and sizes of buildings, and other structures, the percentage of lot that may be occupied, the sizes of yards, courts, and other open spaces, the density of population, and the location and use and extent of use of buildings and structures and land for trade, industry, residence, or other purposes."

N.J.S.A. 40:55-31 provides:

> "For any or all of said purposes the governing body or board of public works may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this article, and it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings or other structures, and the nature and extent of the uses of land, within such districts. * * *

The purposes of zoning are set forth in R. S., 40:55-32, N.J.S.A., as follows:

> "Such regulation shall be in accordance with a comprehensive plan and designed for one or more of the following purposes; to lessen congestion in the streets; secure safety from fire, panic and other dangers; promote health, morals or the general welfare; provide adequate light and air; prevent the overcrowding of land or buildings; avoid undue concentration of population. Such regulations shall be made with reason-

able consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality."

Thus not only has the Constitution conferred on the Legislature very broad powers to pass enabling acts with respect to zoning but the Legislature in a like effort to make effective its constitutional power in this respect has given the municipalities similar broad powers expressed in considerably greater detail than in the Constitution. To the traditional presumption with respect to the validity of every legislative act there has been added, moreover, the constitutional mandate to construe such legislation liberally in favor of the municipalities. These constitutional and statutory changes have in effect adopted the reasoning of the dissenting opinion in Brookdale Homes, Inc., v. Johnson, 126 N.J.L. 516, 19 A. 2d 868 (E. & A. 1941) and rendered inapplicable the decision of the majority of the Court of Errors and Appeals holding invalid an ordinance imposing minimum restrictions on the size of dwellings to protect the character of a community and property values therein, Id., 123 N.J.L. 602, 603, 10 A. 2d 477 (Sup. Ct. 1940), affirmed o. b. 126 N.J.L. 516, 19 A. 2d 868 (E. & A. 1941). We are bound by these changes in our organic law and accordingly this court in Schmidt v. Board of Adjustment of the City of Newark, 9 N.J. 405, 88 A. 2d 607 (1952), has held that so long as the zoning ordinance was reasonably designed, by whatever means, to further the advancement of a community as a social, economic and political unit, it is in the general welfare and therefore a proper exercise of the zoning power. The underlying question before us is whether in the light of these constitutional and legislative provisions the zoning ordinance of the defendant township is arbitrary and unreasonable. That question, moreover, must be answered in the light of the facts of this particular case. We must bear in mind, finally, that a zoning ordinance is not like the law of the Medes and Persians; variances may be permitted, the zoning ordinance may be amended, and if the ordinance proves

unreasonable in operation it may be set aside at any time.

In Duffcon Concrete Products, Inc., v. Borough of Cresskill, 1 N. J. 509, 513, 64 A. 2d 347, 349, 9 A.L.R. 2d 678 (1949) we said:

> "What may be the most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing within the municipality and its needs, present and reasonably prospective, but also on the nature of the entire region in which the municipality is located and the use to which the land in that region has been or may be put most advantageously."

The Township of Wayne is still for the most part a sparsely settled countryside with great natural attractions in its lakes, hills and streams, but obviously it lies in the path of the next onward wave of suburban development. Whether that development shall be "with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality" and whether it will "prevent the overcrowding of land or buildings" and "avoid undue concentration of population" depends in large measure on the wisdom of the governing body of the municipality as expressed in its zoning ordinance. It requires as much official watchfulness to anticipate and prevent suburban blight as it does to eradicate city slums.

Has a municipality the right to impose minimum floor area requirements in the exercise of its zoning powers? Much of the proof adduced by the defendant township was devoted to showing that the mental and emotional health of its inhabitants depended on the proper size of their homes. We may take notice without formal proof that there are minimums in housing below which one may not go without risk of impairing the health of those who dwell therein. One does not need extensive experience in matrimonial causes to become aware of the adverse effect of overcrowding on the well-being of our most important institution, the home. Moreover, people who move into the country rightly expect more land, more living room, indoors and out, and more

freedom in their scale of living than is generally possible in the city. City standards of housing are not adaptable to suburban areas and especially to the upbringing of children. But quite apart from these considerations of public health which cannot be overlooked, minimum floor-area standards are justified on the ground that they promote the general welfare of the community and, as we have seen in Schmidt v. Board of Adjustment of the City of Newark, 9 N. J. 405, 88 A. 2d 607 (1952), supra, the courts in conformance with the constitutional provisions and the statutes hereinbefore cited take a broad view of what constitutes general welfare. The size of the dwellings in any community inevitably affects the character of the community and does much to determine whether or not it is a desirable place in which to live. It is the prevailing view in municipalities throughout the State that such minimum floor-area standards are necessary to protect the character of the community. A survey made by the Department of Conservation and Economic Development in 1951 disclosed that 64 municipalities out of the 138 reporting had minimum dwelling requirements. In the light of the Constitution and of the enabling statutes, the right of a municipality to impose minimum floor-area requirements is beyond controversy.

With respect to every zoning ordinance, however, the question remains as to whether or not in the particular facts of the case and in the light of all of the surrounding circumstances the minimum floor-area requirements are reasonable. Can a minimum of living floor space of 768 square feet for a one-story building; of 1,000 square feet for a two-story dwelling having an attached garage; and of 1,200 square feet for a two-story dwelling not having an attached garage be deemed unreasonable in a rural area just beginning to change to a suburban community? It is significant that the plaintiff admits that of the 100 houses in its development 30 met the minimum requirements when constructed and 20 more by voluntary additions of the owners to meet their individual needs have been enlarged to conform to the minimum requirements of the ordinance, and while this litigation has been pending 20 others have been

constructed conforming to the ordinance. If some such requirements were not imposed there would be grave danger in certain parts of the township, particularly around the lakes which attract summer visitors, of the erection of shanties which would deteriorate land values generally to the great detriment of the increasing number of people who live in Wayne Township the year round. The minimum floor area requirements imposed by the ordinance are not large for a family of normal size. Without some such restrictions there is always the danger that after some homes have been erected giving a character to a neighborhood others might follow which would fail to live up to the standards thus voluntarily set. This has been the experience in many communities and it is against this that the township has sought to safeguard itself within limits which seem to us to be altogether reasonable.

Two minor points raised on this appeal remain to be determined. The defendant contends that the plaintiff's action is premature in that no application to the building inspector of the township was made and denied prior to making this attack on the ordinance. The point is without merit under Fischer v. Township of Bedminster, 5 N. J. 534, 76 A. 2d 673 (1950).

Finally, the defendant contends that the trial court erred in failing to enter judgment dismissing with prejudice the second count of the plaintiff's complaint, despite the fact that the defendant's motion to that effect was granted because of the plaintiff's failure to adduce any proof in support thereof. We fail to understand the trial court's reluctance on this point and are of the opinion that the defendant is entitled to have its judgment of dismissal with prejudice duly signed and entered.

The judgment on the first count of the plaintiff's complaint is reversed. Judgment shall be entered with prejudice in favor of the defendant on the second count of the complaint.

For reversal: Chief Justice Vanderbilt, and Justices Heher, Burling, Jacobs and Brennan—5.

For affirmance: Justices Oliphant and Wachenfeld—2.

Jacobs, *J.* (concurring).

The Township of Wayne is a sprawling residential municipality which is sparsely populated and largely undeveloped. Like many North Jersey communities it is fertile territory for extensive development; unlike less fortunate communities it is still in a position to plan and control its development and avoid the ravages which may be observed in unplanned and unsightly urban, and occasional suburban, municipalities.

In 1946 the township, acting through its planning board, engaged a professional city planner to formulate a master plan. Working with the board and a citizens committee he submitted his plan and included therein a recommendation that every new dwelling in the township have minimum living space of 1,200 square feet. After considerable discussion the township declined to accept the proposed minimum but did provide in its ordinance of July 12, 1949 that one-story dwellings shall have not less than 768 square feet, that two-story dwellings with garages attached shall have not less than 1,000 square feet, and that two-story dwellings without garages attached shall have not less than 1,200 square feet. The figure of 768 feet was approved after weighing all the pertinent factors including the fact that during the preceding year 85% of the applications for building permits were for dwellings containing 768 feet or more in living space and the further fact that the 768 figure would enable the use of "standard size lumber" in 24′ x 32′ houses. The provisions with respect to two-story dwellings were influenced in considerable part by aesthetic considerations which I believe to be entirely proper. See Borough of Point Pleasant Beach v. Point Pleasant Pavilion, 3 N. J. Super. 222, 225, 66 A. 2d 40, (App. Div. 1949); Heher, J. dissenting in Brookdale Homes, Inc., v. Johnson, 126 N. J. L. 516, 521, 19 A. 2d 868, (E. & A. 1941); Sayre, Aesthetics and Property Values 35 A.B.A.J. 471 (1949); Zoning; Permissible Purposes, 50 Col. L. Rev. 202, 212 (1950). In the Point Pleasant case I recently expressed the view, to which I adhere fully, "that it is in the public interest that our com-

munities, so far as feasible, should be made pleasant and inviting and that primary considerations of attractiveness and beauty might well be frankly acknowledged as appropriate, under certain circumstances, in the promotion of the general welfare of our people." [3 N. J. Super., 222, 66 A. 2d 41.] And in the Brookdale case Justice Heher expressed the view that, on principle, regulation on aesthetic grounds would seem to be within the police power [126 N.J.L. 516, 19 A. 2d 871] "if so far promotive of the interests of the public at large, through the resultant community development and profit, as to outweigh the incidental restraint upon private ownership." Cf. Wright v. Vogt, 7 N. J. 1, 7, 80 A. 2d 108 (1951); General Outdoor Advertising Co. v. Department of Public Works, 289 Mass. 149, 193 N. E. 799, 816 (Sup. Jud. Ct. 1935), appeal dismissed General Outdoor Advertising Co. v. Hoar, 297 U. S. 725, 56 S. Ct. 495, 80 L. Ed. 1008 (1936); Perlmutter v. Greene, 259 N. Y. 327, 332, 182 N. E. 5, 6, 81 A.L.R. 1543 (Ct. App. 1932). To the extent that our earlier cases express outmoded narrower doctrines, see Passaic v. Paterson Bill Posting Co., 72 N.J.L. 285, 287, 62 A. 267 (E. & A. 1905) they ought be expressly disavowed.

In the light of modern understanding, adequate living space must be considered as having reasonable relation to health, particularly mental and emotional health. See Report on Planning the Home for Occupancy issued by the Committee on the Hygiene of Housing of the American Public Health Association, pp. 1, 17 (1950); Thompson v. City of Carrollton, 211 S. W. 2d 970 (Tex. Civ. App. 1948); Flower Hill Building Corp v. Village of Flower Hill, 199 Misc. 344, 100 N.Y.S. 2d 903 (Sup. Ct. 1950). Cf. Simon v. Town of Needham, 311 Mass. 560, 42 N. E. 2d 516, 141 A.L.R. 688 (Sup. Jud. Ct. 1942). During the trial below Dr. Winslow, Professor of Public Health at Yale University for over 30 years, testified forcefully to that effect and also pointed out that "the sense of inferiority due to living in noticeable substandard homes probably does more damage to the health of children than all the unsanitary plumbing." See 60 Yale L. J. 507 (1951). His studies have led him to the view that the proper goals for the present are 400 square feet minimum living space for one person, 750 for two, 1,000

for three and 1,150 for four; the average family in Wayne Township contains between three and four persons. It may be noted that there are numerous communities in our State which have comparable minimum living space requirements. Mr. Herbert H. Smith, Chief of the Planning Section of the New Jersey Department of Conservation and Economic Development, testified that of 138 communities replying to his inquiries 64 have such requirements, including 21 which have a single minimum applicable throughout the entire municipality.

The township's ordinance was attacked by complaint filed in the Law Division in August 1950 by the plaintiff, a corporation which had developed Lionshead Lake. Prior to July 1949 it had built approximately 100 houses, including many which contained lesser living space than provided in the ordinance; since the adoption of the ordinance 20 additional houses have been built, all satisfying the prescribed minimum living space requirements. The plaintiff has not at any time sought any exception or variance under R.S. 40:55-39, N.J.S.A.; on the contrary it sought and obtained from the lower court a judgment which determined that the ordinance is "invalid with respect to Residence 'A' and 'B' Districts in which the plaintiff's property is situated, and the same be and is hereby set aside and of no force and effect and for nothing holden." Lionshead Lake, Inc., v. Tp. of Wayne, 13 N. J. Super. 490, 500, 80 A. 2d 650 (Law Div. 1951). The plaintiff's purpose apparently was to resume the construction of structures, discontinued upon the adoption of the ordinance, containing 484 square feet of living space. The record contains photographs of these tiny structures described at one point as "doll houses"; perhaps the following excerpt from Jonathan Swift's Verses on Blenheim, though in other context, is not inappropriate:

> "Thanks, sir, cried I, 'tis very fine,
> But where d'ye sleep, or where d'ye dine?
> I find, by all you have been telling,
> That 'tis a house, but not a dwelling."

It seems to me that the lower court's striking down of the Township's ordinance was clearly erroneous. See Thomp-

son v. City of Carrollton, supra, where an ordinance prescribing a minimum of 900 square feet was sustained; Dundee Realty Co. v. City of Omaha, 144 Neb. 448, 13 N. W. 2d 634 (1944) where an ordinance providing for 1,000 square feet minimum for one-story dwellings and 1,200 square feet minimum for more than one-story dwellings was likewise sustained; and Flower Hill Building Corp. v. Village of Flower Hill, supra, where the court declined to declare that an 1,800 square feet minimum was invalid on its face. Admittedly the township's ordinance was entitled to the benefit of the presumption of validity and reasonableness. Lumund v. Board of Adjustment of the Borough of Rutherford, 4 N. J. 577, 586, 73 A. 2d 545 (1950); Guaclides v. Borough of Englewood Cliffs, 11 N. J. Super. 405, 411, 78 A. 2d 435 (App. Div. 1951). It constituted important legislative action representing the governing body's best judgment as to what zoning restrictions were required to promote the health, morals and general welfare of the community as a whole. Decent respect for its problems and sincerity required that its action remain unimpaired in the absence of clear showing that it was arbitrary, unreasonable, or beyond the authority of the general Zoning Act. Cf. Ogden v. Saunders, 12 Wheat. 213, 217, 25 U. S. 213, 270, 6 L. Ed. 606, 625 (1827). I find no such showing in the record.

A witness for the plaintiff testified that at the time of the adoption of the ordinance the cost of a house containing 768 square feet of living space, if mass produced, would approximate $9,500 to $10,500. On the other hand, another witness testified "that a year round one-family home, containing 768 square feet in area complying in all respects with the building code of the Township of Wayne would presently cost between $8,500 and $9,200." Applications for permits filed by the plaintiff since the passage of the ordinance indicated that it was constructing such houses at even lesser stated costs. The record contains nothing to indicate the buying power of residents of Passaic County where Wayne Township is located, although the May 10, 1952 issue of Sales Management (at p. 414) estimates that Passaic County has an average effective buying income

per annum of $6,000 per family, and represents the forty-ninth highest county in the United States. In the light of the foregoing I find no basis for the suggestion that the minimum in the ordinance is unreasonably high; in any event it is clearly within the broad range which should be allowed in the interests of social progress. Cf. Schmidt v. Board of Adjustment, Newark, 9 N. J. 405, 416, 88 A. 2d 607 (1952).

The further suggestion has been advanced that the ordinance is defective in that it does not differentiate between various sections of the township and is not related to the number of occupants of the dwelling. This ignores the fact that the ordinance prescribes only *minimum* footage which is small enough to be applicable throughout the entire community. If any neighborhood ought have a higher minimum perhaps it will be dealt with in a later ordinance; in the meantime no harm is done to it by any of the present restrictions. Similarly, perhaps some later ordinance will attempt to deal with the complex subject of relating minimum living space to actual occupants; in the meantime the prescribed minimum is sufficiently low to be applied generally. No matter what may be the size of the particular family the 786 feet minimum will be a significant step forward when contrasted with the plaintiff's "doll houses." Mathematical precision in the ordinance need not be attained; it is sufficient that its comprehensive provisions are reasonably calculated to achieve ends which are within the broad ambit of proper modern day zoning. Cf. Duffcon Concrete Products, Inc. v. Borough of Cresskill, 1 N. J. 509, 64 A. 2d 347, 9 A. L. R. 2d 678 (1949); Guaclides v. Englewood Cliffs, supra.

Finally the point has been made that the ordinance does not comply with the requirement in R. S. 40:55-32, N. J. S. A., that reasonable consideration be given to the character of the district and its peculiar suitability for particular uses with a view of conserving the value of property. The ordinance does not seek to convert a business district into a residential district, as in Scarborough Apartments, Inc., v. City of Englewood, 9 N. J. 182, 87 A. 2d 537 (1952), nor does it do violence to any of the existing neighborhoods.

On the contrary, it simply seeks to preserve and improve the acknowledged residential character of the entire community. See Guaclides v. Englewood Cliffs, supra. The improvement will conserve property values (cf. Sayre, supra; 50 Col. L. Rev. 201, 213 (1950)) and will strengthen the residential nature of every occupied neighborhood within the township including Lionshead Lake. It is inconceivable that the Legislature in R. S. 40:55-32, N. J. S. A., or elsewhere in the Zoning Act contemplated the frustration of these highly desirable goals. See Greenway Homes v. River Edge, 137 N. J. L. 453, 456, 60 A. 2d 811 (Sup. Ct. 1948); Birkfield Realty Co. v. Board of Com'rs of City of Orange, 12 N. J. Super. 192, 79 A. 2d 326 (App. Div. 1951) certification denied 8 N. J. 319, 85 A. 2d 272 (1951).

OLIPHANT, *J.* (Dissenting):

I find I must dissent from the philosophy and the result arrived at in the majority opinion. Zoning has its purposes, but as I conceive the effect of the majority opinion it precludes individuals in those income brackets who could not pay between $8,500 and $12,000 for the erection of a house on a lot from ever establishing a residence in this community as long as the 768 square feet of living space is the minimum requirement in the zoning ordinance. A zoning provision that can produce this effect certainly runs afoul of the fundamental principles of our form of government. It places an unnecessary and severe restriction upon the alienation of real estate. It is not necessary, it seems to me, in order to meet any possible threat to the general health and welfare of the community.

It should be borne in mind that the threat to the general welfare and health of the community usually springs from the type of home that is maintained within the house rather than the house itself. Certain well-behaved families will be barred from these communities, not because of any acts they do or conditions they create, but simply because the income of the family will not permit them to build a house at the cost testified to in this case. They will be relegated to living in the large cities or in multiple-family dwellings

even though it be against what they consider the welfare of their immediate families.

My difficulty with the provision in this ordinance is that it applies equally to every part of the 25½ square miles of this township and it applies without any regard to how the various districts of the community have been zoned. It applies to the districts classed Residence A and B, Business or Industrial Districts. While it is conceivable that some municipalities may be of such a cohesive and homogeneous character as to warrant the imposition of certain uniform regulations on the entire community, viz., the prohibition of any industrial plants in a purely residential community, Duffcon Concrete Products, Inc. v. Borough of Cresskill, 1 N. J. 509, 64 A. 2d 347, 9 A. L. R. 2d 678 (1949); Struyk v. Samuel Braen's Sons, 17 N. J. Super. 1, 85 A. 2d 279 (App. Div. 1951), affirmed o. b., 9 N. J. 294, 88 A. 2d 201 (1952), the defendant township is certainly not of such character. It is sparsely settled and is made up of a group of widely separated communities or developments, and in some of these developments the minimum living space requirements imposed by the ordinance are easily met by all the existing dwellings while in other sections only a minority of the houses meet the standards imposed, and in the plaintiff's Lionshead Lake Development only about 50% of the dwellings comply.

To impose identical living floor space minimums on all the sections of such a municipality is to fail completely to give any consideration whatever to the "character of the district and its peculiar suitability for particular purposes." While zoning regulations may legitimately be imposed in the district to serve the general welfare by "conserving the value of property and encouraging the most appropriate uses of land", such regulations are wholly unreasonable and beyond the zoning power and an unwarranted interference with private property rights if they are designed or operate to change completely, for better or for worse, the very character of the district. Any regulation imposed must bear a reasonable relation to the particular area subject thereto. Insofar as the minimum living floor space requirements of the ordinance under re-

view apply to the entire community and to the plaintiff's properties in particular, they are clearly arbitrary and capricious and were very properly set aside by the trial court as an abuse of the zoning power.

My views on this particular phase of zoning do not prohibit minimum floor space in a house in particular districts or a proper correlation of minimum floor space in the house and the area of the lot or lots in question, but I cannot agree with the majority when they state with respect to this minimum square footage requirements that "whether it will 'prevent the overcrowding of land or buildings' and 'avoid undue concentration of the buildings' depends in large measure on the wisdom of the governing body of the municipality." This is clearly indicative of a lack of standard with respect to this particular phase of zoning in the Zoning Act itself and it assumes that the discretion of the zoning board or governing body of a municipality amounts to wisdom. To buttress their position the majority further states: "We may take notice without formal proof that there are minimums in housing below which one may not go without risk of impairing the health of those who dwell therein." In so stating they inferentially approve certain theories advanced to sustain this ordinance by text writers and certain reports of the Department of Conservation and Economic Development. But it seems to me that the decision as to what the minimum square footage in a particular house should be is essentially within the legislative province, and the Legislature not having spoken it is not within the power of this court or the Department of Conservation and Economic Development to attempt to supply the deficiency in the statute.

I am authorized to say that Mr. Justice Wachenfeld concurs in this opinion.

13

Office - Supreme Court, U.S.
DEC 12 1952
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 429

LIONSHEAD LAKE, INC.,

Appellant,

vs.

TOWNSHIP OF WAYNE, A MUNICIPAL CORPORATION OF THE COUNTY OF PASSAIC AND STATE OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

JAMES J. LANGAN,
Counsel for Appellee.

EMORY, LANGAN AND LAMB,
FRED G. STICKEL, III,
Of Counsel.

INDEX

Subject Index

	Page
Statement in opposition to appellant's statement of jurisdiction and motion to dismiss or affirm	1
Statement of issues on appeal	1
No substantial federal question is presented by the attempted appeal	4

Table of Cases Cited

American Veteran's Housing Cooperative, Incorporated v. *Zoning Board of Adjustment*, 69 D. and C. 449 (Pa.), 66 Montgomery 7	5
Dundee Realty Co. v. *Omaha*, 144 Neb. 448, 13 N. W. 2d 634	5
Euclid v. *Ambler Realty Co.*, 272 U.S. 365, 71 Law ed. 303, 47 S. Ct. 114	4
Flora Realty and Investment Company v. *City of Ladue*, 344 U.S. 802	5
Flower Hill Building Corp. v. *Village of Flower Hill*, 199 Misc. 344, 100 N. Y. Supp. 2d 903	5
Fox Film Corp. v. *Muller*, 296 U.S. 207, 80 Law. ed. 158, 56 S. Ct. 183	3
Hadachek v. *Sebastian, et al.*, 239 U.S. 394, 60 Law. ed. 348, 36 S. Ct. 143	4
Lionshead Lake, Inc. v. *Township of Wayne, etc.*, 10 N. J. 165	2
Portland Railway, etc. Co. v. *Oregon Railroad Commission*, 229 U.S. 397, 51 Law ed. 1248, 33 S. Ct. 820	4
Senefsky v. *City of Huntington Woods*, 307 Mich. 728, 149 A.L.R. 1433	5
Thompson v. *City of Carrolton*, 211 S. W. 2d 790	5
Zahn v. *Board of Public Works*, 274 U.S. 325, 71 Law ed. 1074, 47 S. Ct. 594	4

Statutes and Other Authorities Cited

Constitution of the United States, Fourteenth Amendment	2
Zoning Ordinance of the Township of Wayne, State of New Jersey	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 429

LIONSHEAD LAKE, INC., A NEW JERSEY CORPORATION,
Appellant,

vs.

TOWNSHIP OF WAYNE, A MUNICIPAL CORPORATION OF THE COUNTY OF PASSAIC AND STATE OF NEW JERSEY,
Appellee

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The Appellee in the above entitled cause for its statement in opposition to Appellant's statement as to jurisdiction herein, and in support of Appellee's motion to dismiss or affirm herein made pursuant to Rule 12 (3) of this Court, respectfully shows the following:

I

Statement of Issues on Appeal

The question sought to be presented in this appeal is Appellant's claim that a portion of the Zoning Ordinance of the Township of Wayne providing for a minimum dwelling floor space in private residences is violative of Ap-

pellant's rights under the Fourteenth Amendment to the Constitution of the United States. This claim the Appellee denies. The New Jersey Supreme Court in the opinion and judgment here challenged, did not in its opinion pass upon the general question now raised on this appeal by Appellant as to whether Zoning Ordinances which provide for a minimum dwelling space violate the Federal Constitution.

The New Jersey Supreme Court merely held that the provisions in the Ordinance requiring a specified minimum dwelling floor space were permitted by the New Jersey Constitution and the enabling State statute.

In the majority opinion of the New Jersey Supreme Court written by Vanderbilt, C. J. (10 N. J. 165 at 171) he said:

> "When the enabling zoning statutes, R. S. 40:55-30 and 31, both as amended by Chapter 305 of the Laws of 1948, *supra*, and R. S. 40:55-32, are read in the light of the constitutional mandate to construe them liberally, there can be no doubt that a municipality has the power by a suitable zoning ordinance to impose minimum living-floor space requirements for dwellings."

An examination of the Appellant's brief in the Supreme Court discloses that at no place did Appellant's counsel argue that the right to fix a minimum dwelling floor space is prohibited by the Federal Constitution. His entire argument in the State Supreme Court was that this particular minimum is unreasonable and arbitrary. Certainly it cannot be expected that this Court is going to examine the various Zoning Ordinances of all of the municipalities of the country to determine whether a certain minimum is reasonable. The argument of Appellant in the State Supreme Court was under four headings, and are as follows:

> "I—The test of the constitutionality of the instant zoning ordinance is whether it is reasonable and fair in its application and whether it bears a substantial relation to the public health, safety and morals; and

these questions of reasonableness and relationship are questions of fact.

II—There is an abundance of evidence in the record to support the Court's dispositive holding (which holding is one of fact) in the instant case.

III—Plaintiff's action was not premature.

IV—The judgment appealed from is complete in all respects and no further judgment is necessary."

It is clear that the general proposition that minimum dwelling floor space requirements in Zoning Ordinances violate the Federal Constitution, was not argued in the New Jersey Supreme Court by Appellant, and on well settled principles is not to be considered now by this Court.

The only respect in which the constitutionality of the Zoning Ordinance below was attacked in the State Court by Appellant, was on the ground that this particular Zoning Ordinance was unreasonable and arbitrary as applied to this particular Township. The record will disclose that this Appellee offered demonstrative proof that the fixing of a minimum dwelling floor space had a relation to health and that it stabilized property values. The proof with respect to the health feature was given by Dr. Winslow, an outstanding authority on public health, and the proof with respect to the stabilization of land values was given by Mr. Scott Bagby, a well known expert on municipal planning. Certainly it cannot be expected that this Court should take this case merely for the purpose of reiterating such well settled principles as that the preservation of health and the stabilization of land values by a municipality are within the police power.

It is apparent from the foregoing that the State Supreme Court disposed of Appellant's attack on the Ordinance upon adequate non-federal grounds, and accordingly, this appeal should be dismissed or the judgment of the State Court affirmed (*Fox Film Corp.* v. *Muller*, 296 U. S. 207, 80 Law Ed. 158, 56 S. Ct. 183).

II

No Substantial Federal Question Is Presented by the Attempted Appeal

Since the attack on the Ordinance below was on the ground that this particular Ordinance was unreasonable and arbitrary as applied to this particular municipality, we submit it cannot be said that there is any substantial federal question presented for decision by this Court. Certainly it cannot be expected that this Court is to act as an administrative agency in considering the reasonableness of the Zoning Ordinances of all of the municipalities of this country. Furthermore, there is clearly no merit to the contention that the Ordinance is arbitrary and unreasonable. That contention is answered fully and conclusively by the opinion of Vanderbilt, C. J. in the New Jersey Supreme Court. The power of States and Cities to place restraints and restrictions on the use of property by zoning laws in furtherance of the general welfare of the community has long ago been so definitely determined that no substantial question is presented by this appeal entitling appellant to invoke the jurisdiction of the Supreme Court of the United States. See *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 71 Law Ed. 303, 47 S. Ct. 114; *Zahn* v. *Board of Public Works*, 274 U.S. 325, 71 Law Ed. 1074, 47 S. Ct. 594, and *Hadacheck* v. *Sebastian, et al.*, 239 U. S. 394, 60 Law Ed. 348, 36 S. Ct. 143.

This Court in *Portland Ry., etc. Co.*, v. *Oregon R. R. Commission*, 229 U. S. 397, 51 Law Ed. 1248, 33 S. Ct. 820, said:

> "In this case the facts found by the lower court and adopted in the (State) Supreme Court are supported by competent testimony; and this Court does not sit to retry issues of fact thus heard and determined by

the properly constituted tribunals of the State having jurisdiction of the subject."

As a matter of fact, in five other jurisdictions approval has been given by the Courts to the general proposition that Zoning Ordinances with minimum dwelling space requirements are sustainable.

See:

Thompson v. *City of Carrolton*, 211 S. W. 2d 790 (Tex. Civ. App. 1948);

Flower Hill Building Corp. v. *Village of Flower Hill* (Sup. Ct. 1950); 199 Misc. 344, 100 N.Y. Supp. 2d 903;

Dundee Realty Co. v. *Omaha*, 144 Neb. 448, 13 N. W. 2d 634;

American Veteran's Housing Cooperative Inc. v. *Zoning Board of Adjustment*, 69 D. & C. 449 (Pa.) 66 Montgomery 7;

Senefsky v. *City of Huntington Woods*, 307 Mich. 728, 149 A.L.R. 1433 (Mich. Sup. Ct. (In Banc) 1493).

In the *Senefsky* case *supra*, the Court held that the ordinance there under review was unreasonable and arbitrary for the particular municipality involved. However, the Court at page 1436, as reported in 149 A.L.R., said:

> "It is not necessary for decision herein and we do not hold that under proper circumstances a municipality may not exercise its delegated police power in the manner herein attempted by defendants. Instead the extent of our holding herein is that under the circumstances of the instant case the enforcement against the plaintiff of the provision in the amended ordinance fixing the minimum amount of floor area is unreasonable."

This case is very similar to the case of *Flora Realty and Investment Company* v. *City of Ladue*, No. 228, October

Term 1952, in which this Court granted Appellee's motion to dismiss.

Wherefore, Appellee respectfully moves that the appeal herein be dismissed, or that the judgment of the Supreme Court of the State of New Jersey be affirmed.

JAMES J. LANGAN,
Counsel for Appellee.

EMORY, LANGAN & LAMB,
FRED G. STICKEL, III,
Of Counsel.

(5430)

INDEX

Subject Index

Page

Brief of Appellant in Opposition to Motion of Appellee to Dismiss or Affirm 1

Appellee's statement opposing jurisdiction confirms the jurisdiction of this court 1

The federal question presented is substantial 3

The opinion of the Supreme Court itself raises grave doubt as to the correctness of the judgment 4

In reviewing state court determinations of Federal questions this Court is not debarred from reviewing questions of fact 6

The cases cited by appellee do not sustain constitutionality of minimum dwelling space ordinances 7

Conclusion 8

TABLE OF CASES CITED

Aetna Life Insurance Co. v. *Haworth*, 300 U.S. 227, 240 (1937) 3

Baker v. *Somerville*, 138 Neb. 466, 293 N.W. 326 (1940) 7

California v. *San Pablo & T.R. Co.*, 149 U.S. 308, 313, 314 (1893) 3

Drivers Union v. *Meadowmoor Co.*, 312 U.S. 287, 293 (1941) 6

Dundee Realty Co. v. *Omaha*, 144 Neb. 448, 13 N.W. 2d 634 (1944) 7

Euclid v. *Ambler Co.*, 272 U.S. 365 (1926) .....5 & 6

Flora Realty and Investment Company v. *City of Ladue*, No. 228 O.T. 1952 7

Flower Hill Building Corp. v. *Village of Flower Hill*, (Sup. Ct. 1950) 199 Misc. 344, 100 N.Y. Supp. 2d 903.. 7

Page

Kansas City Southern Ry. Co. v. *C.H. Albers Commission Co.*, 223 U.S. 573, 591 (1912) 6
Lawrence v. *State Tax Comm.*, 286 U.S. 276, 282 (1932) 3
Live Oak Water Users Assn. v. *Railroad Commission of California*, 269 U.S. 354, 354-358 (1926) 2
Portland Ry. etc. Co. v. *Oregon R.R. Commission*, 229 U.S. 397 (1913) 6
Senefsky v. *City of Huntington Woods*, 370 Mich. 728, 12 N.W. 2d 387 (1943) 7
Thompson v. *City of Carrollton*, 211 S.W. 2d 970 (Tex. Civ. App., 1948) 7

STATUTES AND OTHER AUTHORITIES

Revised Zoning Ordinance for Wayne Township, New Jersey, dated July 12, 1949 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 429

LIONSHEAD LAKE, INC., a New Jersey Corporation,
Appellant,

v.

TOWNSHIP OF WAYNE, a Municipal Corporation of the County of Passaic and State of New Jersey.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM

This brief of the appellant opposing the motion of appellee to dismiss or affirm is filed pursuant to the provisions of Rule 7, ¶ 3.

1. APPELLEE'S STATEMENT OPPOSING JURISDICTION CONFIRMS THE JURISDICTION OF THIS COURT

The omissions in the Statement Opposing Jurisdiction and Motion to Dismiss or Affirm are more important and significant than the contentions made therein.

The appellee does not deny that the question of the validity of the Wayne Township ordinance under the Federal

Constitution was presented to the Supreme Court of New Jersey. Indeed, it could hardly do so in view of its Petition for Certification to the Supreme Court of the State quoted at page 7 of the Statement of Jurisdiction.

The appellee further concedes in his Statement Opposing Jurisdiction and Motion to Dismiss or Affirm:

> "The only respect in which the constitutionality of the Zoning Ordinance below was attacked in the State Court by Appellant, was on the ground that this particular Zoning Ordinance was unreasonable and arbitrary as applied to this particular Township." (p. 3)

Appellee's Statement Opposing Jurisdiction further concedes that the constitutionality of the ordinance in question was attacked in the Supreme Court of New Jersey on the grounds (A) that it is unreasonable and unfair in its application, and (B) that it is not within the police power because it bears no substantial relation to public health, safety or morals by quoting *in toto* the questions posed in appellant's brief below.[1] The same issues and contentions were urged by appellant below and although the court did not specifically mention the Federal Constitution these questions affecting the constitutional validity of the ordinance were recognized and discussed by the Supreme Court of New Jersey in its opinion (Statement of Jurisdiction, Appendix B, pp. 24, 31-32).

Under its first point, "Statement of Issues on Appeal," the appellee opposes jurisdiction on two apparent grounds:

> a. "The general proposition that minimum dwelling floor space requirements in Zoning Ordinances violate the Federal Constitution, was not argued in the New Jersey Supreme Court." (p. 2)

---

[1] We recognize, of course, that briefs below are not part of the record before this court *Live Oak Water Users Assn.* v. *Railroad Commission of California*, 269 U. S. 354, 357-358 (1926). Here, however, the quotation of the brief in the court below is obviously an admission by the appellee of the fact.

This we concede. Attack here as well as in the Supreme Court of New Jersey is upon the minimum floor area requirements of a particular ordinance, The Revised Zoning Ordinance of Wayne Township, New Jersey, adopted July 12, 1949. We have never suggested that either this Court or the Supreme Court of New Jersey should exercise jurisdiction other than to review active controversies and adverse interests capable of resolution by a judgment. Appellant corporation does not seek the review of the moot, abstract and "general" propositions which appellee erroneously suggests should have been urged. *California* v. *San Pablo & T. R. Co.*, 149 U. S. 308, 313, 314 (1893); *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 240 (1937).

> b. "The New Jersey Supreme Court merely held that the provisions in the Ordinance requiring a specified minimum dwelling floor space were permitted by the New Jersey Constitution and the enabling State statute." (p. 2)[2]

Appellee draws the conclusion that the decision below rests on adequate non-federal grounds (Statement Opposing Jurisdiction, p. 3). The underlying concept of constitutional law inherent in this proposition is so plainly at war with the established supremacy of the Federal Constitution as to make answer unnecessary.

Appellee's Statement Opposing Jurisdiction in no way impairs appellant's showing that in the state supreme court the federal question was fairly presented by the record, was necessary to determination of the cause, and that there is no adequate non-federal ground for that court's decision.

2. THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

Under its second point, asserting that no substantial federal question is presented, appellee urges:

---

[2] Federal rights are denied as well by a failure of the state court to decide questions presented as by an erroneous decision of them. *Lawrence* v. *State Tax Comm.*, 286 U. S. 276, 282 (1932).

(1) The opinion below demonstrates the validity of the ordinance.

(2) This Court will not retry issues of fact.

(3) Five other jurisdictions have held minimum dwelling space requirements sustainable.

These contentions are considered seriatim:

(1) The Opinion of the Supreme Court Itself Raises Grave Doubt as to the Correctness of the Judgment

Although the court states that it will take judicial notice that there are minimums in housing below which construction may not go without risking the health of the occupants and the adverse affect of overcrowding in the home,[3] it apparently does not rely on these generalities. The nonreliance may result from inadequate support in the record. Appellee's witness on "emotional health" factors admitted that his conclusions were the result of elaborate and abstract calculations predicated upon numerous variables such as size of the occupant family and number and size of rooms (Record 115a and 116a). The ordinance floor space requirements are unrelated to family or room size. Moreover, there was no showing that the essential variables are applicable in Wayne Township.

The lack of substantial relation to health is also apparent on the face of the ordinance. Therein there is no single fixed requirement predicated upon considerations of health. The standard is multiple and variable: 768 square feet is

---

[3] The court's further assertion "Moreover, people who move into the country rightly expect more land, more living room indoors and out, and more freedom" is merely another way of saying that people cannot live in the suburbs unless they have more money. Insofar as it relies on "more land" and "more living room, indoors and out", it ignores the fact that this very ordinance serves to cut down the amount of outdoor living space since the ordinance contains no provisions relating size of dwelling to size of lot. It, in effect, forces the building of a larger house on a relatively small lot.

required for a one story building, 1200 feet is required for a two story building unless it has an attached garage. In the latter instance only 1000 square feet of living space is required. These arbitrary variations demonstrate that the ordinance has no substantial or rational relationship to health.

The court of necessity rested its general finding that the ordinance was within the police power upon the ground that it is necessary "to protect the character of the community", by fixing the minimum size of dwellings. This obviously resolves into nothing more nor less than assertion that the property rights of one citizen may be seriously impaired by such an ordinance for the sole purpose of enhancing the value or preventing depreciation of neighboring property belonging to another.

This ordinance is a restriction upon house construction in effect based solely upon the value of the house. It thus erects economic barriers against the entrance of respectable citizens whose only failing is their inability to pay for houses which meet the aesthetic standards of those who have preceded them.

The court below predicates its conclusion that the ordinance is related to "general welfare" and so within the police powers upon the ground that it preserves the "character of the community" and prevents the "erection of shanties which would deteriorate land values generally." This Court has never recognized that stabilization of property values is alone adequate to sustain exercise of the police power. Indeed, in *Euclid* v. *Ambler Co.*, 272 U. S. 365 (1926), it was recognized that a good guide to the validity of ordinances invading the property rights of the individual owner was the law of nuisances.

(2) In Reviewing State Court Determinations of Federal Questions This Court Is Not Debarred From Reviewing Questions of Fact

Aside from the failure of the Supreme Court of New Jersey to controvert the detailed analysis of the evidence by the trial court showing utter absence of relation of the ordinance to health, and aside from the fact that there was thus no concurrence of the two state courts on the factual aspect of the case, such as obtained in *Portland Ry. etc. Co.* v. *Oregon R. R. Commission*, 229 U. S. 397 (1913) cited by the appellee, the doctrine invoked by appellee has no application here. This Court always has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. *Kansas City Southern Ry. Co.* v. *C. H. Albers Commission Co.*, 223 U. S. 573, 591 (1912); *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287, 293 (1941).

The necessity for examining the circumstances in zoning cases was recognized by this Court in *Euclid* v. *Ambler Co.*, 272 U. S. 365, 387-388:

> "The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. * * * Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality."

(3) The Cases Cited by Appellee Do Not Sustain Constitutionality of Minimum Dwelling Space Ordinances

Of the state cases cited by appellee (p. 5) as sustaining minimum dwelling space ordinances, only one in fact so held. In *Thompson* v. *City of Carrollton*, 211 S. W. 2d 970 (Tex. Civ. App., 1948), the ordinance was sustained on the ground that aesthetic objectives alone are part of general welfare, for which police power may be exercised, a theory never accepted by this Court.

The other cases cited by appellee strongly support appellant's attack on the ordinance. In *Flower Hill Building Corp.* v. *Village of Flower Hill*, 199 Misc. 344, 100 N. Y. Supp. 2d 903 (Sup. Ct. 1950), the court applied the *Euclid* case rule quoted above merely ordering the case for trial to determine the "circumstances." In *Dundee Realty Co.* v. *Omaha*, 144 Neb. 448, 13 N. W. 2d 634 (1944), the opinion specifically states that the minimum building floor space requirements of the ordinance in question had earlier been repealed in keeping with that court's decision that such provision, because it sprang solely from aesthetic considerations, was not within the police power, *Baker* v. *Somerville*, 138 Neb. 466, 293 N. W. 326 (1940). In *Senefsky* v. *City of Huntington Woods*, 370 Mich. 728, 12 N. W. 2d 387 (1943), the court held the ordinance invalid.

There is slight, if any, comfort for appellee in the cases it cites. Of course, the *Flora* case[4] cited by appellee as "very similar" resembles the instant case only in that it is a zoning case. There any similarity in subject matter, constitutional challenge or facts ends.

The brief opposing jurisdiction is important only because its silence thereon in effect concedes that the federal constitutional question was adequately raised and presented in the state supreme court.

---

[4] *Flora Realty and Investment Company* v. *City of Ladue*, No. 228 O. T. 1952.

CONCLUSION

It is respectfully submitted that a substantial federal question timely raised and preserved is here presented, that this Court has jurisdiction, and that the motion of the appellee should be denied.

ALBERT L. REEVES, JR.,
WILLIAM D. DONNELLY,
HERBERT S. COLTON,
Counsel for Appellant.

CUMMINGS, STANLEY, TRUITT & CROSS,
COLTON & CAVINESS,
REUBEN P. GOLDSTEIN,
Of Counsel.

JANUARY 19, 1953.

Per Curiam Decision.

No. 429. LIONSHEAD LAKE, INC. *v.* TOWNSHIP OF WAYNE. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Albert L. Reeves, Jr.* and *William D. Donnelly* for appellant. *James J. Langan* and *Fred G. Stickel, III* for appellee. Reported below: 10 N. J. 165, 89 A. 2d 693.